Supreme Court of the United States

October Term, 1939

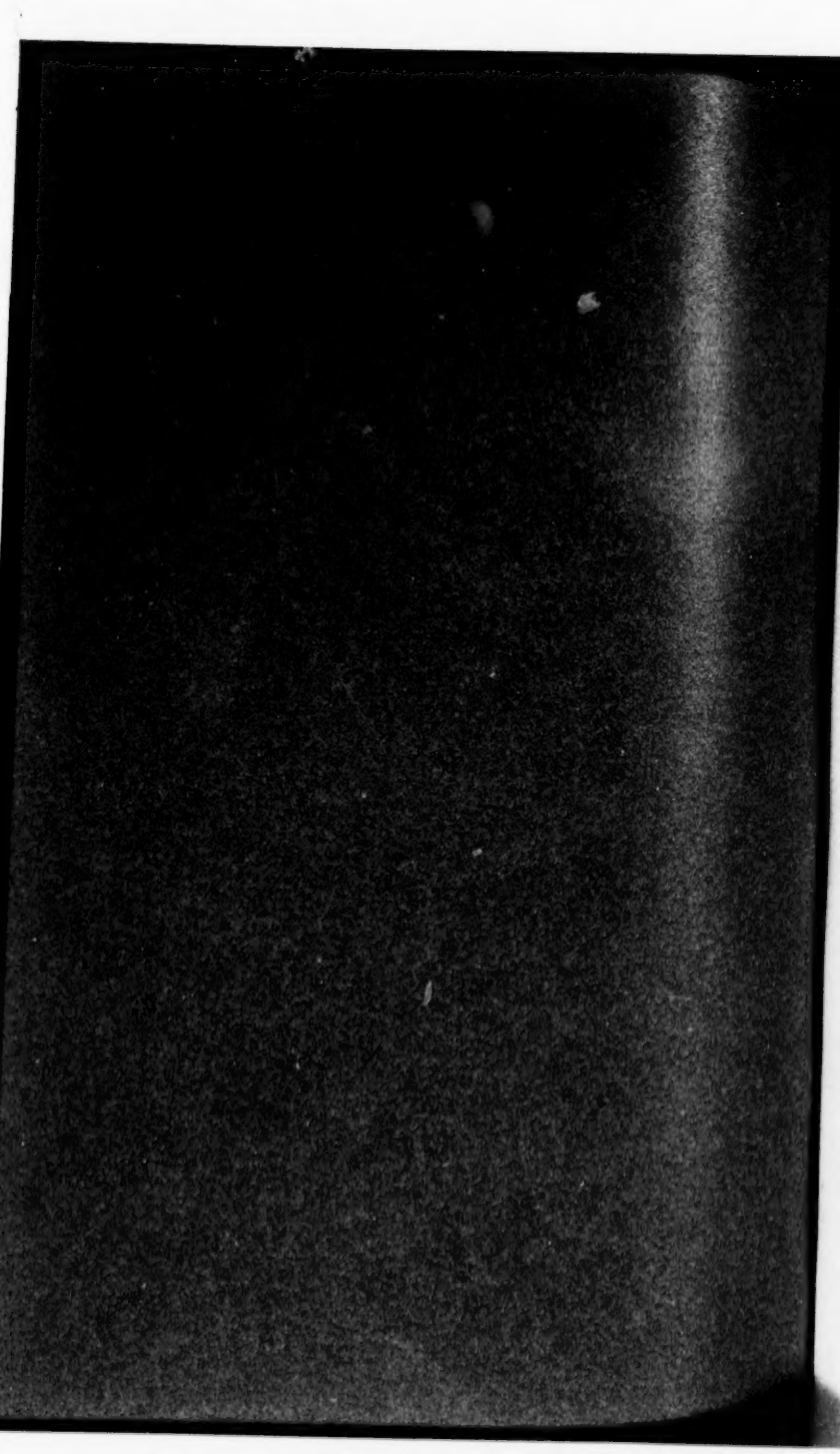
No. 456

Appeal from United States Circuit Court of Appeals
Ninth Circuit

United States,
Appellant
vs.
Southern Pacific Railroad Company,
George Lemmon et al.,
Appellees

Brief for United States

By JOSEPH R. CALL,



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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1900.

No. 186.

UNITED STATES,
Appellant,
vs.
(SOUTHERN PACIFIC RAILROAD COMPANY),
GEORGE LOOMIS, et al.,
Appellees.

Appeal From the United States Circuit Court of Appeals, Ninth Circuit.

Brief for United States.

Statement.

This suit, which is a continuation of the suit of the United States against the Southern Pacific Railroad Company, and numerous other defendants claiming to be purchasers of certain tracts of lands (see 168 U. S., 1), was brought in the year 1890 to quiet title to some seven

hundred thousand acres of land within the limits of the forfeited grant to the Atlantic & Pacific Railroad Company, and claimed by the defendants by virtue of certain junior grants made to the Southern Pacific Company.

The case is now before the court for the second time, it having been before brought up on appeal by the Southern Pacific Company and the other defendants (see 168 U. S., 1–66), and is now before the court upon appeal by the United States from the supplemental decree of the Circuit Court of August 5, 1898, entered in alleged pursuance of the mandate of this court authorizing a final decree against certain defendants.

Upon appeal by the United States to the Circuit Court of Appeals for the Ninth Circuit, that court affirmed the decree of the Circuit Court.

The bill of complaint of the United States against the Southern Pacific Railroad Company was filed in the Circuit Court May 17, 1890 [record 89–101], defendant was served with subpœna May 19, 1890 (record 102), and thereafter and on September 25, 1891, an amended bill was filed in which numerous persons other than the railroad company were made parties defendant, who claimed to be purchasers of certain tracts of land from the railroad. [record 103–122.]

The answer of all the defendants to the amended bill was filed March 14, 1892 [record 122], and was amended June 12, 1893, which answer denied the title of the United States to the lands and alleged that the lands had been granted to the Southern Pacific Railroad Company by Congress. [record 148.]

The case was heard upon the merits in the Circuit Court, and a decree was there entered containing the following adjudications:

"That the United States of America is the owner by title in fee simple absolute of all the sections of land * * * ." (Describing all of the lands for which suit was brought.)

"And the defendants are and each of them is forever enjoined and restrained from chopping upon or carrying from said lands any trees, timber or wood, *and from claiming or asserting any right, title or interest in or to the said lands or any thereof.*"

The decree also annulled all patents issued by the United States to the Southern Pacific Railroad Company for any of said lands.

The decree also provided as follows:

"nor shall this decree in anywise affect any right which the defendants or any of them, *other than the said Southern Pacific Railroad Company*, now have or may hereafter acquire in, to or respecting any of the lands hereinbefore described in virtue of the act of Congress entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands and for other purposes. Approved March 3, 1887." [rec. 187–189.]

From this decree, affirmed by the Circuit Court of Appeals, the Southern Pacific Company and the other defendants appealed to this court, with the result that the decrees of the courts below were affirmed in accordance with the opinion in 168 U. S., 1–66, and the mandate of the court provided as follows:

"*The decree is affirmed in all respects as to the Southern Pacific Railroad Company as well as to the trustees in the mortgage executed by that company; also as to the other*

defendants, subject, however, to the right of the United States to proceed in the Circuit Court to a final decree as to these defendants." [record 16–18.]

Of the 700,000 acres of land involved in this suit, for which decree was entered against the Southern Pacific Railroad Company and the trustees of the mortgage bonds, and affirmed as against them in all respects by this court (168 U. S., 1–66), it appears that the greater part have never been sold or contracted to be sold by the railroad company. The answer of that company alleged that of the lands sued for by the Government, 120,769 acres had been sold or contracted to be sold by the Southern Pacific Company, prior to commencement of the suit.

Although a large part of the purchasers were made parties defendant in this cause, the defendants appeared and made proof of purchase from the railroad company of only 52,600 acres, of which amount 9,284 acres were patented by the United States to the Southern Pacific Company, and 43,315 acres remained unpatented.

It appeared to be impracticable to secure a final adjudication as to the purchasers in the Circuit Court, excepting as to those who had appeared and made proof of purchase from the railroad company, and therefore, in order that the bulk of the lands included in the decree against the railroad company might be relieved from an apparent litigation and be restored to public settlement, and in order that the Interior Department might proceed to adjust the title to those lands as to which proof of purchase had not been made, in pursuance of the act of March 3, 1887, the attorney for

the United States, upon filing the mandate of this court in the Circuit Court, on January 7, 1898, dismissed, without prejudice, further proceedings in this cause as to the defendants other than the railroad company and the trustees of the mortgage bonds, as to certain tracts of land, and at the same time moved for a further decree against the defendants (other than the railroad company and the trustees) as to the remaining tracts of land, amounting to 52,600 acres. [record 19–25.]

Upon submission of the matter the Circuit Court rendered a further and supplemental decree "*as to the rights and interests of defendants other than the Southern Pacific Railroad Company and D. O. Mills and Gerritt L. Lansing, trustees.*" [record 48–70.]

By this decree the Circuit Court adjudged that all of the tracts of land to which the Government sought a further decree was held by defendants who were *bona fide* purchasers from and under the Southern Pacific Railroad Company within the meaning of the Act of Congress of March 3, 1887, or of March 2, 1896. [record 48–70.]

Some of the tracts had been patented by the United States, and as to those tracts the court *confirmed* the title of the defendant purchasers respectively, and others of the lands had not been patented, and as to those the Circuit Court adjudged that the respective purchasers were *bona fide* purchasers within the meaning of Section 5 of the act of Congress of March 3, 1887, and were also citizens of the United States and entitled to procure patents from the United States upon compliance with the provisions of the act of 1887.

By the mandate of this court the decrees of the courts below had been "*affirmed in all respects as to the Southern Pacific Railroad Company*," and under that mandate the Circuit Court was not authorized to proceed further nor in any way against the railroad company or the trustees, and therefore very properly did not by its decree undertake to adjudicate upon any rights of the railroad company or of the trustees to these lands, but limited the scope and effect of its decree to the "*defendants other than the railroad company and the trustees.*"

From this decree of the Circuit Court, affirmed by the Circuit Court of Appeals, the United States has appealed to this court upon the ground that the court erred in adjudging certain purchasers to be *bona fide* purchasers of the lands, within the meaning of said acts of Congress of 1887 and 1896 as specified in the assignment of errors of the United States.

It is stipulated that upon this appeal the record in this court upon the *former appeal* should be used as a part of the record upon this appeal. [record 71, 72.]

But for convenience of the court those parts of the former record have, in pursuance of a stipulation between the parties, been reprinted which it is supposed will be necessary for consideration upon this appeal, the questions and matters decided upon the former appeals having become *the law of the case*. [record 1–12.]

However, the transcript and entire printed record before the court upon the former appeal of the defendants (Southern Pac. R. R. Co. vs. United States, No. 71, October term, 1897) is a part of the record and may be referred to if necessary.

Assignment of Errors.

1. The court erred in adjudging that defendants, other than the Southern Pacific Railroad Company, or any of them is a *bona fide* purchaser from and under said Southern Pacific Railroad Company, within the meaning of the act of Congress of March 3, 1887, or act of Congress of March 2, 1896, of the lands described in said decree, or any of them.

2. The court erred in refusing to adjudge that the United States is the owner by title in fee absolute of all of the lands described in said decree.

3. The court erred in adjudging that defendant Jackson A. Graves is a *bona fide* purchaser of the lands confirmed to him by said decree or any of them.

4. The court erred in adjudging that those defendants who purchased lands from the Southern Pacific Railroad Company subsequent to November 22, 1889, the date of commencement of the suit of United States States vs. Southern Pacific Railroad Company, the decision of the Supreme Court in which case is reported in 146 U. S., 615–619, were not affected and charged thereby with notice of the right and title of the United States to the lands within the limits of the grant of the Atlantic and Pacific Railroad Company.

5. The court erred in refusing to adjudge that those defendants who purchased lands from the Southern Pacific Railroad Company subsequent to July 6, 1886, the date of the approval of the act of Congress forfeiting the lands and rights to lands granted to the Atlantic and Pacific Railroad Company, and restoring said lands to the public domain, were not charged thereby with notice of the right and title of the United States to said lands.

6. The court erred in refusing to adjudge that those defendants who purchased unpatented lands from the Southern Pacific Railroad Company by executory contracts, where only a part of the purchase price was paid, which contracts recited in effect that the railroad company had not yet secured a patent or title to said lands, and that if it failed to do so, that the company would refund the money paid by the purchaser, were not af-

fected and charged thereby with notice of the right and title of the United States to said lands.

7. The court erred in adjudging that any defendant who proposed by his so-called contracts to purchase unpatented lands from the Southern Pacific Railroad Company, in the event that patents were procured from the United States to said company, and to pay for such lands in installments is a "purchaser" within the meaning of said act of March 3, 1887, or the act of March 2, 1896, it appearing that the procurement of patent from the United States was a condition precedent to said sale.

8. The court erred in adjudging that any of said defendants who purchased any of said lands from the Southern Pacific Railroad Company subsequent to the passage of said act of March 3, 1887, is a *bona fide* purchaser, or entitled to any of the benefits of said act or any act amendatory or supplemental thereto.

9. The court erred in adjudging that those defendants who purchased lands from the Southern Pacific Railroad Company subsequent to the promulgation of the decision of the Secretary of Interior in the case of Gordon vs. Southern Pacific Railroad, 5 L. D., 691, viz, on June 7, 1887, were not affected and charged with notice thereby that the lands and rights to lands in California, granted to the Atlantic and Pacific Railroad Company, were restored to the public domain by the act of Congress of March 6, 1886.

10. The court erred in refusing to adjudge that the Southern Pacific Railroad Company and those in privity with that company, who contracted to purchase lands, while the former suits, reported in 146 U. S., 615–619, were pending, were not bound by the adjudications in those cases.

11. The court erred in adjudging that any executory contract for the sale of land made by the Southern Pacific Railroad Company is valid as to any payment made thereon after notice to the purchaser of the rights of the United States.

First Point.

WHATEVER HAS BEEN DECIDED UPON THE FORMER APPEALS CONCERNING THE RESPECTIVE CLAIMS AND RIGHTS OF THE PARTIES TO THIS SUIT CANNOT BE RE-EXAMINED ON THIS SECOND APPEAL. Adjudications had and rulings made in the former appeals are now the law of the case, and as to what was adjudged can best be determined by reference to the mandates and opinions.

In Thompson vs. Maxwell Land Grant Company, 168 U. S., 451, at page 456, the court said:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case." Supervisors vs. Kennicott, 94 U. S., 498, and cases cited in the opinion: Clark vs. Keith, 106 U. S., 461; Chaffin vs. Taylor, 116 U. S., 567; Northern Pacific Railroad vs. Ellis, 144 U. S., 458; Great Western Telegraph Company vs. Burnham, 162 U. S., 339–343.

An examination of the opinion (see 168, U. S., 1–66) will show that the court decided that the issues in the case had been finally determined in the cases in 146 U. S., 570, 615, 619, *as to the Southern Pacific Railroad Company*, and the trustees of mortgage bonds, and that upon the merits of the whole case the Government was entitled to a decree as to the remaining defendants, except as to such tracts of land as may have been confirmed to them or protected in their hands by the acts of Congress of 1887 and 1896. (see appendix for acts.)

Concerning the situation of the lands embraced in this suit, the court said [168 U. S., 46, 47]:

"The lands now in controversy are situated opposite to and are co-terminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23rd section of the Texas and Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic & Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic & Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic & Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States."

"But all the lands now in dispute are within the limits of the grant to the Atlantic and Pacific Railroad Company, *if* the maps filed by that company in 1872, and which were approved by the Land Department, are to be regarded as maps of definite location. This is substantially admitted to be a correct statement of the *controlling question* before the court; * * * *

As to the new evidence introduced which was not in the cases in 146 U. S., 570, 615, 619, the court said (see 168 U. S., p. 62):

"Even if we were prepared upon a re-examination of the former cases, or upon the showing made by the present record, to hold that the maps of 1872 were not valid maps of definite location, we could not for that reason, in this proceeding, go behind the former adjudication. * * * ."

And at page 65 the court said :

"*We cannot concur in the view that the evidence upon this branch of this case is of such nature as to compel the court, in the interest of truth and justice, not only to consider it, but to pass again upon the issue made in the former suits as to the character of the maps of 1872. Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or on the other.*"

The court, therefore, adjudged in this case as in the former cases that a valid grant was made to the Atlantic & Pacific Railroad Company by the Act of Congress of 1866, and that it was forfeited to the United States by the act of 1886, and that the operative effect of the forfeiture act was to restore these lands to the public domain without the Southern Pacific Railroad Company having acquired any interest in them that affected the power of the United States to forfeit and restore them to the public domain.

It was also adjudged that the grants to the Southern Pacific Company did not operate upon the lands appertaining to the Atlantic & Pacific grant.

The Circuit Court had adjudged that the decree was not to affect any rights which the defendants other than the railroad company had or might acquire to the lands under the act of Congress of March 3, 1887.

That act provided in effect that *bona fide* purchasers of lands erroneously *patented* to a railroad company could procure a second patent from the Government upon making proof of *bona fide* purchase, and that *bona fide* purchasers of *unpatented lands* sold by the company as a part of its grant, but which were excepted from the grant, could *purchase* the lands from the

United States by paying the ordinary Government price.

It was supposed when the decree of the Circuit Court was passed that the power to determine who were qualified purchasers of these lands and to pass upon the proofs as to the *bona fides* of the transactions was a matter exclusively within the jurisdiction of the Interior Department, and consequently the decree saved to such purchasers whatever rights they had, if any under that act.

After the decree in the Circuit Court was entered Congress passed the act of March 2, 1896, *confirming* the titles of *bona fide* purchasers of lands patented to the railroad, which has properly been treated as an amendment of the act of 1887.

Commenting upon the action of the Circuit Court in saving the rights of the purchasers under the act of 1887, the Court said (see p. 65):

"One of the objects of this suit was to obtain a decree quieting the title of the United States, not only to the lands claimed by the Southern Pacific Railroad Company but to those claimed by numerous individual defendants by purchase from or contract with that company. The decree which was passed declares that it is not to affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled, 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March 3, 1887. *Instead of leaving undetermined the matters in dispute between the United States and the defendants, other than the Southern Pacific Railroad Company, the*

Circuit Court should have determined, by its final decree, what rights those defendants have by virtue of the above act of March 3, 1887, 24 Stat., 556, c. 376, in the lands or any of them now in dispute and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. *The Government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of Congress.* United States vs. Winona & St. Peter Railroad, 165 U. S., 463; Winona & St. Peter Railroad vs. United States, 165 U. S., 483. But as the Government has not appealed, the decree cannot be reversed for the error of the Circuit Court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company.

"*The result is that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the Government to proceed in the Circuit Court to a final decree as to those defendants, and it is so ordered.*"

The particular language to which the attention of the court is invited is that wherein the court said: "*The Government was entitled to a decree quieting its title to all the lands described in the pleadings except those, if any, that are protected in the hands of claimants by acts of Congress.*"

The present defendants were parties upon the record in the former appeal *claiming under the title of the Southern Pacific and not under any other right or title.* The court adjudged that the Southern Pacific acquired no title under the Congressional grants. Consequently

the Government was entitled to a decree against all the defendants except for such lands as were confirmed by the acts of either March 3, 1887, February 12, 1896, or March 2, 1896. (see appendix.)

Second Point.

PURCHASERS WITH NOTICE OF THE ADVERSE CLAIMS OF THE GOVERNMENT TO THESE LANDS, ARE NOT *BONA FIDE* PURCHASERS.

The terms "*bona fide* purchaser" and "purchaser in good faith," employed in the acts of Congress of 1887 and 1896, do not have the definition and significance which is ordinarily given to them.

At common law and in equity a *bona fide* purchaser is, one who purchases for a *valuable consideration*, *without notice* and *in good faith*.

Pom. Eq. Jur., 745.

The two Winona cases (165 U. S., 463 and 483) clearly define the meaning in which these terms were employed in the acts of Congress mentioned.

The first case shows the extent to which one is protected who claims to be a *bona fide* purchaser, and the next case shows that there are limitations upon the rights of the purchaser, and that *all* who purchase from the railroad company, even where they testify that they purchased in good faith, are not within the protection of the acts.

In the absence of these special acts, the purchaser from the railroad would of course be bound to take notice of the power of the officers of the Interior Depart-

ment, of the act of Congress granting these lands to the Atlantic and Pacific Company, and of the maps of definite withdrawal, and executive orders reserving these lands for that company, of record in the Interior Department and in the local land offices, and so in every such case the purchaser of lands from any railroad, which lands are excepted from the grant, would be bound to know that the public laws and records showed that the title was not in the railroad but in the Government.

In such case the chain of title of the grantor of the purchasers would be incomplete in not showing that a conveyance had been made to the railroad.

In the first Winona case (165 U. S., 463, 482) the court decided, that where lands within the limits of the railroad grant had been erroneously patented to the company by the United States, and thereafter the company had sold the lands for a valuable consideration to those who purchased in good faith, that the title of such purchaser was confirmed by the act of March 2, 1896, notwithstanding that under ordinary circumstances the purchasers would be bound to take notice from the laws and public records that there was no title in their grantor, and the court held *that the object of the legislation was to cure the erroneous acts and decisions of the officers of the Interior Department in recognizing the title of the railroad and in issuing patents, upon the faith of which acts and patents the purchaser had relied.*

In the second Winona case (165 U. S., 483, 486) the court decided *that the acts of 1887 and 1896 were intended only to protect the purchaser against the erroneous*

acts of the Interior Department prior to the issuance of patent.

The reason for this construction is obvious.

In withdrawing the lands for the company, and in recognizing its title, and in issuing patents, the officers of the Interior Department had led the purchasers to believe, to their prejudice, that the railroad had title to the lands, but whenever after that the Interior Department *ceased to recognize the title of the railroad*, and from any decision to the contrary or from other act, the purchaser would be bound to know that the title was not in the railroad company, he would be affected with notice, either actual or constructive, of the want of title of his grantor.

If it were not for this limitation upon these acts, the railroad company could continue to sell from the public domain, or from the lands of the United States, any tracts within the limits of its grant, although every department of the Government may have publicly declared that such lands were the property of the United States.

Without applying this common-sense limitation this railroad company could go on and sell to purchasers the National Reservation adjoining Yosemite Park; it could sell and dispose of the United States building and grounds in Los Angeles; and it could convey away to a *bona fide* purchaser the Government Military Reservation at San Pedro; and so it could go on and grant all of the United States property within thirty miles of either side of its road from San Francisco to Yuma, not only this year but next year and every succeeding year.

The limitations of the acts of 1887 and 1896 are clearly pointed out in the Winona cases (165 U. S., 483, at pages 485 and 486), in which the court said:

"That the land was erroneously certified is, under the prior decisions of this court, not open to question; and the acts of 1887 and 1896 have, as indicated in the opinion in the prior case, the purpose of protecting only that party whose purchase from the railroad company must be considered one in good faith. *It is essential to the protection of these statutes that the party purchasing from the railroad company has no notice by any fact subsequent to and independent of the certification or patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent.*"

It is true that the Interior Department withdrew these lands for the Southern Pacific Company as well as for the Atlantic and Pacific Company, and it is also true that by the erroneous action of the Interior Department four patents were issued for portions of these lands, upon the dates respectively, March 29, 1876; April 4, 1879; December 27, 1883, and January 9, 1885.

Under the construction given to these protective acts, purchasers of these lands, in reliance upon these acts of the Interior Department, could have at that time, and until otherwise informed, purchased these lands from the railroad company in good faith, and their title would have been protected and confirmed by the acts of 1887 and 1896.

But in the year 1886 every department of the Government began to operate to protect the title of the United States to these lands, and in every public way gave

notice to the world of the rights of the Government to them.

On July 6, 1886, Congress passed an act declaring that the lands in California granted to the Atlantic and Pacific Railroad Company were *forfeited* and *that they were thereby restored to the public domain.*

That they were so restored by operation of that act was decided in United States vs. Southern Pacific Company, 146 U. S., 570, 619.

That act of Congress was a law of the land, and binding upon every person within the jurisdiction of the United States.

On June 7, 1887, the Interior Department decided, in the case of Gordon vs. Southern Pacific Railroad Company (5 Land Decisions, 691), that the lands granted to the Atlantic and Pacific Railroad Company by the act of 1866, within both granted and indemnity limits, were not operated upon by the subsequent grants to the Southern Pacific Company, and that those lands were, by operation of the act of Congress of July 6, 1886, *restored to the public domain*, and were subject to entry under the settlement laws of the United States.

This decision was made a matter of record in the Interior Department, and published throughout the United States in the official decisions of the Secretary of the Interior.

That decision has been followed and adhered to from that day down to the present time, as appears from the following cases :

Coble vs. Southern Pacific Co., 6 L. D., 679, 812.
Southern Pacific Railroad, 6 id., 816.

Southern Pacific Railroad, 16 id., 317.

Moore vs. Kellog, 17 id., 391.

Union Oil Co., 25 L. D., 351, at page 357.

On November 22, 1889, a Bill of Complaint was filed by the United States against the Southern Pacific Railroad Company and others in the United States Circuit Court, Southern District of California, asserting title to the lands within the limits of the Atlantic and Pacific grant, and the issues in that case, and claims of the respective parties, carried notice to the world that the claims and rights of the respective parties *embraced the whole of the grant* of the Atlantic and Pacific Company in California (Southern Pacific Company vs. United States, 168 U. S., 1), and these issues were determined in favor of the Government, as appears from the decision in that case and in the former cases (United States vs. Southern Pacific Company, 146 U. S., 570, 615, 619).

On May 14, 1890, the present bill of complaint was filed against the Southern Pacific Railroad Company to quiet and determine to title of the United States to these particular lands.

The Southern Pacific Railroad Company, believing that it was more powerful than the Government of the United States, has ignored these acts of Congress, and decisions of the courts, and rulings of the Interior Department, and has continued to make contracts of sale for these lands and to receive money from purchasers from the date of the act of July 6, 1886, and the purchasers of these lands, in equal disregard of the rights of the Government, and of the *published* laws

and notice given them by judicial proceedings and rulings of the interior Department, have continued to purchase these lands and make payments to the railroad company, and now, clothing themselves in the garb of *bona fide* purchasers, seek the protection of this court.

Fortunately for the interests of the Government and of the public, the court has put a proper limitation upon the extent to which such purchasers can claim *bona fides* within the meaning of the acts of 1887 and 1896.

The defendant purchasers, therefore, under the construction given to these statutes, should be chargeable with notice, to the same extent as in other cases, of all that has occurred since the issuance of the patents to the Southern Pacific Company as to patented land, and of all that has occurred as to unpatented land since the Interior Department or acts of Congress, or litigations against the company by the United States, have ceased to recognize any right in the Southern Pacific Company to these lands, and since the Government has, through its various departments, asserted title to them.

As the purchasers are chargeable with notice since those dates, the principle is applicable that one who purchases with notice is not a *bona fide* purchaser.

Simmons Co. vs. Doran, 142 U. S., 417, 435, 437.

Nesbit vs. Riverside, 144 U. S., 610, 618.

Lytle vs. Lansing, 147 U. S., 59.

Sutliff vs. Lake Co., 147 U. S., 230.

The appendix to this brief contains a "table of land sales" showing sales and contracts to sell made by the Southern Pacific Railroad Company, date of contract,

name of purchaser, acreage sold, purchase price, amount paid, and showing whether or not patented.

1. It is submitted that those who purchased or made payments to the railroad after the passage of the act of Congress of *July 6, 1886*, forfeiting to the United States these lands, and *declaring them restored to the public domain*, are affected with notice, and charged by that act with knowledge of the rights of the United States. This statute is a public law of which all must take notice, and it has been twice decided that that act operated to restore these lands to the public domain.

United States vs. Southern Pacific, 146 U. S., 570, 615, 619.

Southern Pacific vs. United States, 168 U. S., 1–66.

2. THE ADJUSTMENT ACT OF MARCH 3, 1887, AS AMENDED BY THE ACTS OF 1896, IS NOT PROSPECTIVE IN ITS OPERATION.

Many of the sales or contracts to sell made by the Southern Pacific Company were made long after the passage of the act of March 3, 1887. [see appendix.]

Curative or legalizing acts such as this are made to remedy some existing defect, and to cure some previous omission, which would otherwise result in injury to a person who in justice should be protected.

Such acts do not have a *prospective* operation unless so declared.

Similar acts have been construed as operating only upon purchases made prior to their passage.

Gilson vs. Robinson, 68 Cal., 539, 543.

Durand vs. Martin, 120 U. S., pp. 372, 374.

The act of 1887 contemplates the protection of

bona fide purchasers who purchased *prior* to the passage of the act, and not as a continuing license to the railroad to sell from the public domain lands of the United States.

Section 4 of the act declares what sales of patented lands are to be operated upon as those lands "which *have been sold* by the grantee company to citizens of the United States.

Section 5 of the act declares, "that where any such company *shall have sold* to citizens of the United States * * * * lands not conveyed to or for the use of such company * * * * and where the lands so sold are for any reason excepted from the operation of the grant," that such purchasers, being *bona fide*, may acquire the land from the United States.

The utmost that can be claimed for this act is that it contemplates an "*immediate adjustment*" of the railroad land grants, as provided in section 1 of the act, and that the act intended to protect those purchasers who purchased at any time prior to such *adjustment*, or prior to the time when such adjustment shall have reached a stage when the Secretary of the Interior shall have decided that the lands were *excepted* from the railroad grant.

It is provided in section 2 of the act, "That if it shall appear upon the *completion of such adjustment* or *sooner* that lands have been from any cause heretofore erroneously certified or patented * * * " that such patents shall be vacated. Therefore, whenever "*it shall appear*" by Interior Department rulings that the land

was excepted from the grant, no one could be misled any longer by erroneous acts.

This seems to have been the construction adopted by the Secretary of the Interior, for it was said by that officer in Andrus vs. Balch, 22 Land Dec., 238, 241, "I am of the opinion that it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good, *and before the land purchased was held to be excepted from the grant.*"

The present suit was commenced on May 14, 1890, and the former suits were commenced November 22, 1889, and they were all commenced under orders of the Secretary of the Interior, based upon decisions made in 1887 and 1888, in which he determined that the lands within the Atlantic and Pacific grant were excepted from the operations of the grant to the Southern Pacific Company.

As before stated, the first decision of the Secretary of the Interior upon the status of these lands was rendered June 7, 1887, a little more than three months after the passage of the act of March 3, 1887.

Gordon vs. Southern Pacific Company, 5 Land Dec., 691 followed in

Coble vs. same, 6 id., 679.

Southern Pacific Railroad, id., 816,

and was thereafter followed by other decisions before cited.

Even under the construction adopted by the Interior Department, the act would not operate upon sales made after June 7, 1887, and there is no reason why it should.

The object of the act was to protect *bona fide* purchasers from the railroad who bought in reliance upon erroneous acts of the Interior Department in patenting lands or in reserving lands for the benefit of the railroad, and when the Interior Department finally declared that such lands were excepted from the grant to the railroad, the reason for the protection ceased.

Sales made after that date are therefore neither within the *letter* or the *spirit* of the act.

If rulings and decisions of the Interior Department, decisions and decrees of the Federal courts, and acts of Congress cannot, singly or all combined, even so much as charge the purchaser of these lands from the railroad with notice of the rights of the Government, when, it may be asked, will there ever come a time when the rights of the United States will be protected?

The railroad could go on and sell public lands this year, and next year and thereafter for all time to "*bona fide* purchasers."

It is true that public expenses might be somewhat reduced, because there would be no need of maintaining a general land office, or any local land offices, the business of disposing of the public land would all be done through the land departments of the railroads; but however convenient this might be for some people, it is submitted that the continued administration of the public lands was not intended by any act of Congress to be turned over to railroad corporations.

It is submitted that the Circuit Court erred in its decree in protecting those who purchased after March 3, 1887, and clearly as to those who purchased after June 7, 1887.

3. Those who *or made payments* to the railroad after *June 7, 1887*, the date of the promulgation of the decision of the Secretary of the Interior, above cited, adjudging that the lands within the granted and indemnity limits of the Atlantic and Pacific grant were forfeited and restored to the public domain by the act of July 6, 1886, are thereby chargeable with notice of the want of title in the railroad. Those decisions are not only a matter of record in the Interior Department, upon which depends the right and title of the railroad company, but they are also in the nature of executive orders, and are taken judicial notice of by the courts, and, consequently, by the public.

Caha vs. United States, 152 U. S., 211.

Heath vs. Wallace, 138 U. S., 573, at page 584.

4. Those who purchased or made payments to the railroad company after *November 22, 1889*, the date of filing of the amended bill in the United States Circuit Court by the United States against the Southern Pacific Railroad Company (the defendants then being in court), which cases are reported in 146 U. S., 570, 615, 619, in which the right of the United States to the Atlantic and Pacific lands was asserted by the Government and denied by the Southern Pacific Company, are chargeable with notice of the issues presented by that bill.

Upon the issues presented by the pleadings and proofs, (see 146 U. S., 570 and 168, U. S., 1), it had been *finally and conclusively adjudged*, as between the United States and the Southern Pacific Railroad Com-

pany, that a valid grant had been made to the Atlantic and Pacific Railroad Company by the act of 1866, which was definitely established by maps filed in 1872, and that the grant had been forfeited by the act of 1886, *and by operation of that act these lands had been restored to the public domain*, without the Southern Pacific Railroad having acquired any interest in those lands.

The court said also, in 168 U. S., at page 48, "that a right, question, or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties *or their privies*."

The amended bill in that case (decided in 146 U. S., 615, 619) was filed November 22, 1889 (see 168 U. S., p. 30), and the defendant's answer was filed December 30, 1889 (see 168 U. S., p. 33).

The Southern Pacific Railroad Company, *and those in privity with it*, are therefore bound by the adjudication in that case, and those who purchased after commencement of that suit from the Southern Pacific Railroad Company, basing their claims to lands under these grants to the Southern Pacific Company, are in privity with the railroad company.

The principle is well settled that a third person who purchases a right or an interest in property under litigation from a party to the suit is bound by the judgment entered to the same extent as if a formal party to the record, and in contemplation of law such purchaser is represented by the party from whom he purchased.

Murray vs. Ballou, 1 Johns. Ch., 566.

Whiteside vs. Hazleton, 110 U. S., 296, at page 301.

Union Trust Co. vs. Southern Co., 130 U. S., 565, 571.

It is therefore submitted that those who purchased or made payments after November 22, 1889, are affected with notice of the rights of the United States, and are not *bona fide* purchasers.

5. Those who purchased lands by executory contracts upon partial payments are *bona fide* purchasers only to the amount paid prior to notice.

To constitute a *purchase* there must also be a *payment*, and as to all payments made after notice, as above mentioned, there is no protection extended to the purchaser.

Lytle vs. Lansing, 147 U. S., 59, at page 70.

Where partial payments have been made upon executory contracts, the legal title remains in the railroad company (if not in the Government), which is held until full payment shall be made, and an equitable right remains in the purchaser to the extent of the payments.

Williams vs. United States, 138 U. S., 514, 616.

Jennisons vs. Leonard, 21 Wall., 302, at page 309.

1 Story's Equity Jur., 396.

The United States therefore is entitled to a decree for all the legal and equitable title and interest remaining in the Southern Pacific Railroad as to those patented lands sold by executory contracts upon partial payment, and which are shown in the table of land sales in the appendix and which relief was denied by the courts below.

The Government is entitled to a decree for the interest and title of the Southern Pacific Railroad Company *in those lands* sold after notice to the purchasers, and for the legal title and interest in all those lands upon which *payments* have been made subsequent to such notice.

6. A large part of the lands in suit unpatented were contracted to be sold on partial payments, where only a small part of the purchase price was paid. The form of contract used by the railroad company as to such unpatented lands was the same in each instance, and these contracts provide, among other things, as follows (see Appendix of Land Sales hereto for references to these contracts):

"It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of the grant of lands to it by the Congress of the United States; that patent has not issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that in consequence of circumstances beyond its control it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, *therefore nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured;* that in case it be finally determined that patent shall not issue to said party of the first for all or any of the tracts herein described, it will, upon demand, *repay* (*without interest*) *to the party* * * * *of the second part all moneys that may have been paid to it by* * * * on account of any such tract as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the

party * * * of the second part, and will not be responsible to * * * for damages or costs in case of * * * failure to obtain and keep such possession." [record 225, 226.]

This instrument is undoubtedly a contract, but is not a conveyance of the lands. And as only a partial payment has been made, the purchaser is not even the equitable owner of the land.

The contract under which these parties agreed to purchase, particularly informs the purchaser that the company has not yet secured patent or title to the land, and further provides that—

"*therefore nothing in this instrument shall be considered a guarantee or assurance that patent or title will be procured.*"

And also it was expressly agreed that the contract should be "*null and void*" if patent shall not be secured *by the company*. [record 226.]

The contract further provides that the company, if it does not procure title, will "repay (without interest) to the party of the second part all moneys that may have been paid to it."

Nothing can be plainer than that those who purchased under these contracts were informed and had notice of facts outside of the records of the land office that the Southern Pacific Railroad Company had not received either *patent* or *title* to the lands so purchased, and therefore that such purchasers do not come within the provisions of the acts of 1887 or 1896.

As the railroad company can never receive a patent or title from the United States the contract to purchase and to sell has terminated and been annulled by its own provisions.

Third Point.

DEFENDANT JACKSON A. GRAVES IS NOT A *BONA FIDE* PURCHASER FROM OR UNDER THE SOUTHERN PACIFIC RAILROAD COMPANY.

1. The Circuit Court adjudged that defendant Graves was a *bona fide* purchaser of about 40,000 acres of land, which Graves purchased in 1893 from the Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, a corporation organized and created under the laws of Great Britian, hereinafter spoken of as the "Fibre Company." This land was purchased from the railroad by the "Fibre Company" in 1885. [record 315-333.] The Fibre Company being an alien corporation (record, 103, 106, 340), and not a *citizen* of the United States, is by the *law* excluded from the benefits of the act of 1887 and amendatory acts.

The United States has appealed from this part of the decree.

There is no conflict in the evidence upon the facts as to the Graves purchase.

The original bill was filed in this case against the Southern Pacific Railroad Company on May 17, 1890. [record, 89–101.]

The Railroad company was served with subpœna May 19, 1890. [record, 102.]

The Government filed an amended bill of complaint on September 25, 1891, in which the Southern Pacific Railroad Company and the "Fibre Company" and numerous other persons claiming to be purchasers of

certain tracts of land from the railroad were made parties defendant. [record, 103–122.]

An order was made in the Circuit Court on December 28, 1891, requiring the defendants brought in by the amended bill, being absent from the state, to appear and plead, which order was returned, duly published, on March 3, 1892.

The answer of the Southern Pacific Railroad Company and the "Fibre Company," and of the other defendants, *was filed March 14, 1892* [record 122, 146], which was amended June 12, 1893. [record 148, 182.]

The court decided the former cases reported in 146 U. S., 570, 615, 619, on *December 12, 1892*, adjudging that the Atlantic and Pacific lands were the property of the United States.

At this time, while there was a pending suit *against* the Railroad Company *and the "Fibre Company"* for these particular lands, with the issues made up, of testmony largely completed, and with an adjudication that all of the lands granted to and set apart for the Atlantic and Pacific Company were the property of the United States, defendant Graves procured a conveyance for the lands now claimed by him from the "Fibre Company," which conveyance was executed January 27, 1893. [record, 340–346.]

Defendant Graves thereupon procured himself to be substituted in the cause for the "Fibre Company." [record 147.]

The Circuit Court did not by its decree adjudge that the "Fibre Company" was a *bona fide* purchaser *from the Southern Pacific Railroad Company*, and the opinion

of the court makes no reference to the *bona fides* of that transaction.

Indeed there is no testimony in the case upon which to base such an adjudication.

The "Fibre Company" being an alien (record 103, 106, 340) *was not entitled to the benefits of the act of 1887.*

The deeds from the railroad company to the "Fibre Company" are in evidence [record 321–333], *but no testimony was taken of any officer or agent of the "Fibre Company"* showing that the company purchased these lands in good faith from the railroad company.

The testimony of Jerome Madden, land agent of the Southern Pacific Railroad Company, was taken before an examiner of the court *on behalf of defendants* in which he testified that the "Fibre Company" had paid for these lands. [record 636–643.]

Madden further testified, in a general way, that all of the purchasers of lands from the Southern Pacific Railroad Company bought in good faith, and he used the following language: "They paid in good faith; they bought in good faith.

The testimony of Madden, in which he volunteered his opinion as to the state of the knowledge of the officers of the "Fibre Company," and as to their mental condition, was objected to by counsel for the United States, upon the following grounds: "Objected to by Mr. Call as incompetent, irrelevant and immaterial, and not the best evidence and involving a conclusion and a mere opinion of the witness." [record 637, 638.]

These objections were insistsd upon to all such tes-

timony of the witness Madden, they were insisted upon in the briefs in the Circuit Court, and are insisted upon here.

Counsel for the defendants did not entertain the idea for a moment that the *bona fides* of a party in a transaction could be shown from the opinion of another is evident from this candid statement at the time Madden's testimony was taken, as follows: "No man can testify what he believes to be the opinion of any other man, and the same is immaterial, incompetent, and irrelevant." [record 639.]

Witness Madden being further asked if these purchasers were *bona fide*, stated, under objections, "many of them." [record 640.]

2. The first contention of the railroad is that the answer to the bill disclosing sales of lands made by the company, amounts received, and names of purchasers, is evidence against the Government as to those matters.

The original bill of complaint and amended bill sought a discovery as to these matters, but the original bill and the amended bill, *both waived answer under oath*.

It is provided in Rules in Equity, No. 41, as amended, as follows:

"If the complainant, in his bill shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, *shall not be evidence in his favor* * * * *"

It is insisted, however, by counsel that as further

matters regarding these alleged sales by the railroad, were brought out upon the *cross-examination* of Madden, *witness for defendants*, that the Government is bound by statements and tables furnished by the witness with the same effect as though the witness were the Government's own.

The witness Madden was cross-examined by counsel for the Government, as to the identical sales, which he had testified about on his direct examination, and the Government brought out more details concerning those sales, such as what lands had been patented and what not patented, and as to what sums had been received upon each of the sales by the company, but there is no dispute but that the cross-examination was proper in every respect.

The principle is well settled that statements of a witness on cross-examination is the evidence of the party producing the witness, and if in taking depositions, proper objections are made to the testimony in chief, and thereafter the witness is cross-examined, the entire cross-examination goes out with the testimony in chief.

The rule is well stated by Judge Brewer in Callison vs. Smith, 20 Kans., 28–37, in which he says:

"If upon any matter the testimony in chief is excluded, no cross-examination thereon is allowed. The fact that testimony has been taken by deposition before the trial, in no manner affects the question of the competency of each and every part of it. Its competency is determined in the same manner, and upon the same principles, as though the witness was present on the stand and being interrogated in person. A question which, if the witness were present, counsel could not ask, cannot be asked in deposition; and if asked

and answered, must be stricken therefrom. In the case of Wilson vs. Wager, 26 Mich., 452, the court, by Christiancy, J., says: 'All testimony elicited on such cross-examination, consisting as it does of facts which relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain, or modify some inference which might otherwise be drawn from them, must in the nature of things constitute a part of the evidence given in chief, and both alike and together must therefore be treated as evidence *given on the part of the party calling the witness.*' It follows from this, that the testimony elicited upon the cross-examination of the witness by the plaintiff must be taken as evidence on the part of the defendant."

To the same effect, see

Wagner vs. People, 30 Mich., 385.

Campau vs. Traub, 27 Mich., 217.

Schratz vs. Schratz, 35 Mich., 485.

Jones vs. State, 35 Fla., 289.

It results from these authorities that the parol testimony of Jerome Madden, witness for defendant, concerning the *bona fides of the defendant purchasers*, both his examination in chief, cross-examination and redirect, must be excluded from the record and from consideration by the court upon this hearing. But regardless of the *bona fides* of the purchase by the "Fibre Company" it is not, by the provisions of the act of 1887 entitled to protection, being an alien. [record, 103, 106, 340.]

3. The question therefore recurs as to whether there is any evidence to sustain the judgment of the Circuit Court that *defendant Graves* purchased in good faith.

The testimony of defendant Graves was taken in

this cause and it is upon this evidence that the Circuit Court adjudged him to be a *bona fide* purchaser of the lands claimed by him.

The deed from the "Fibre Company" to Graves which as before shown, was made *pendente lite*, recites the payment by Graves to the "Fibre Company" of $50,000. Graves testified as follows: [record 313, 314.] "I have paid some (state and county taxes), and there are others that were assessed this year that were canceled by the order of the District Attorney, holding that they were non-assessable lands. * * *

Q. Did you buy these lands in good faith?

A. Yes expecting to make title to them.

Q And do you hold them as said purchaser and as a citizen of the United States?

A. I do.

Q. And as an innocent purchaser?

A. Well——— ——

Q. For value received?

A. I hold them for a valuable consideration.

Q. Well do you claim to be an innocent purchaser of said lands, under the act of Congress of March 3, 1887?

A. I think I am protected under the act of Congress of 1887. I would like to understand this "innocent"—what you mean by that. Of course I have notice of the defect—I have notice of the Congressional action taken, and of the pendency of this suit; had it when I bought. Outside of that I consider myself an innocent purchaser. Of course I had that notice of that suit. There is no use denying that. At the same time I understand—I think I understand the act of Congress of 1887, and I think I am protected under it

Upon cross-examination, Graves testified in answer to questions as follows:

By Mr. Call—Q. How much did you pay the Atlantic and Pacific Fibre Importing and Manufacturing Company for these lands?

A. I have not paid them anything in coin. But I have agreements with them which are the equivalent of the coin.

Q. What is the nature of the agreements?

A. I am to protect them in the title, that is protect them in their original purchase-money; make what I can out of it over and above that.

Q. *And devote your legal services to that end?*

A. *Yes. They have to have somebody at this end.*

Mr. Call—That is all.

From this review of the evidence it appears without contradiction

(a) That Graves procured a conveyance of these lands from the "Fibre Company" *pendente lite.*

(b) That Graves had actual knowledge of the pendency of this suit at that time;

(c) That no consideration in money or in property passed to the "Fibre Company" when the conveyance was made;

(d) That nothing has since been paid;

(e) That Graves took the naked title to the lands at that time in order that he, *as attorney for the company*, could more conveniently devote his legal services in protecting the title of the Fibre Company.

It therefore requires no argument or citation of authorities to show that Graves is not a *bona fide* purchaser of these lands, for each and every one of the reasons hereinbefore mentioned. The authorities, however, above cited, clearly establish the principle that one who purchases with notice is not a *bona fide* purchaser, and that one who purchases *pendente lite* stands in the shoes of his grantor.

4. The acts of Congress of March 3, 1887, February

12, 1896, and March 2, 1896, set forth in the appendix, and relating to the rights of *bona fide* purchasers from land grant railroads, *are upon the same subject* and being in *pari materia* should be construed together and all treated as a single law determining the rights of such *bona fide* purchasers.

United States vs. Healey, 160 U. S., 136, 146.

Frost vs. Wenie, 157 U. S., 46, 58.

Chicago Railroad vs. United States, 127 U. S., 406.

District of Columbia vs. Hutton, 143 U. S., 18.

By the act of February 12, 1896, it is expressly declared that it is an amendment of the act of March 3, 1887, and the act of March 2, 1896, expressly recognizes and confirms the act of March 3, 1887, in the last clause of section 2, in which it provides that a *bona fide* purchaser of patented lands may establish his rights in a United States court," or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress," which act, so referred to, is the act of March 3, 1887.

This provision in the act of 1896 clearly shows the intention of Congress that the rights of a *bona fide* purchaser, and as to who may be a *bona fide* purchaser under the act of 1887, is not in any way enlarged by the act of 1896, because it is provided that the rights of such purchaser may be protected in either the Interior Department or in the United States Court.

Therefore whatever limitations there are in the act of 1887, upon the rights of *bona fide* purchasers, must

be read into the act of 1896, as, in contemplation of law, they are a single statute.

The act of 1887 (sections 3 and 4) limits its protection *to* "*bona fide purchasers, they being citizens of the United States, or to persons who have declared their intention to become such citizens.*"

The acts of February 12, 1896, and March 2, 1896, *referring to the act of 1887*, make further provisions as to "*bona fide* purchasers."

The definition thus given to a "*bona fide* purchaser" is necessarily carried into all these acts.

In Claflin vs. Insurance Company, 110 U. S., 81, at pp. 92-93, the court said upon a similar question:

"We are bound to take the words of the law in their usual, ordinary and literal meaning and to construe the two provisions in the different sections in the same sense which in previous statutes had uniformily been given to them, and not invent a new application and relation of the two clauses without any indication whatever of any intention on the part of Congress to that effect."

In this connection it is significant that all of the laws of the United States regarding disposition of the public domain in every mode and form permits lands to be acquired only by citizens of the United States or those who have declared their intention to become such. It is inconceivable that Congress intended, therefore, in further providing in the act of March 2, 1896, for the protection of *bona fide* purchasers that they intended to repeal the provisions of the act of 1887 and antagonize all the other statutes relating to the public domain, by allowing unlimited quantities of public lands to pass to alien corporations.

Neither is it to be presumed that Congress intended, by the act of 1896, in providing that conformation could be secured either through the Interior Department or through the Federal Court, at the option of the claimant, that in the *Interior Department* citizens of United States, or those who had declared their intention, only would be entitled to protection, and that in the *Federal Court* either citizens or aliens could receive such protection and confirmation of title.

Now the protection extended by sections three and four of the act of 1887 is only *to citizens of the United States* or persons who have declared their intention to become such.

The "Fibre Company," therefore, even if it had shown itself to be a *bona fide* purchaser of these lands, being a corporation organized under the laws of Great Britain, would not have been entitled to the benefits of these statutes, and as defendant Graves has not shown himself to be a *bona fide* purchaser, he is not entitled to such protection.

5. Defendant Graves took a deed from the "Fibre Company" to the lands claimed by that company, amounting to about 50,000 acres, of which about 40,000 acres are the subject of this suit.

But of these 40,000 acres, *more than 35,000 acres of them remain unpatented.* Therefore as to such unpatented land it cannot be claimed that such lands are operated upon by the curative act of March 2, 1896, as that act only purports to protect rights to *patented lands.*

Therefore, independent of the fact that the "Fibre

Company" has not shown itself to be a *bona fide* purchaser from the railroad; and independent of whether the act of 1896 is restricted in its operations to protecting *citizens of the United States*, it appears that inasmuch as these 35,000 acres have *not been patented* or certified to the railroad, that there is no act of Congress which will protect the "Fibre Company" to them, and, as Graves stands in the shoes of that company, he has no protection.

In conclusion, it is submitted that the supplemental decree of the Circuit Court should be reversed as to those defendants who are not *bona fide* purchasers and those who are aliens with directions to enter a decree in favor of the Government for the lands claimed by them.

Submitted,

JOSEPH H. CALL,

Special U. S. Attorney.

Appendix (1).

ACT OF CONGRESS OF MARCH 3, 1887.

(Chapter 376, 2nd session 49 Cong.)

AN ACT To provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon applica-

tion shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands, and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the

United States, by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to land settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 7. That no more lands shall be certified or conveyed to any state or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the

Interior that such transfers may create an excess over the quantity of lands to which such state, corporation, or individual would be rightfully entitled.

Approved, March 3, 1887. (24 Stat., 556.)

ACT OF CONGRESS, FEBRUARY 12, 1896.

(29 Stat., 6.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section four of an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: "*Provided further*, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Governmen a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser."

ACT OF CONGRESS OF MARCH 2, 1896.

(29 Stat., 42.)

Be it enacted, &c., That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall

be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers, to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a *bona fide* purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the *bona fides* of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a *bona fide* purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona fide* purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted, and the title of such claimant or claimaints shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified.

Appendix (2).

Table of Dates in Former Appeal (Case 71 October Term, 1897.)

Showing chronologically dates of grants, filing of maps, and other important acts.

The controlling facts and conclusions of the court upon the effect to be given to this evidence is shown by the opinion upon the former appeal (see 168 U. S., 1–66).

Dec. 2, 1865 ... ...Articles of incorporation of Southern Pacific Railroad Company filed in California, for a railroad "from some point on the Bay of San Francisco, in the

state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego, to the town of San Diego, thence eastward through the said county of San Diego to the eastern line of the state of California."

(record 2266, 2269, case 71, Oct. term, 1897.)

July 27, 1866....Act of Congress granting lands to Atlantic and Pacific Company from Springfield, Mo., to the Pacific ocean, and authorizing the Southern Pacific to make connection at state of California's boundary.

Nov. 23, 1866...Acceptance of this act by A. & P. R. Co. (record 2370, case 71.)

Jan. 3, 1867.....Southern Pacific Railroad map of general route from San Francisco via Mojave to Colorado river at Needles, filed.

Nov. 2, 1869.....Secretary of Interior Browning vacates previous order of suspension of August 20, 1868, and rejects map of 1867, and orders lands restored.

(record 2699, 2702, case 71.)

Nov. 11, 1869...Secretary Cox upon reconsideration, confirms previous orders of November 2, 1869, rejecting map and restoring lands. (record 2699, 2702, case 71.)

April 4, 1870...California Legislature passed act authorizing Southern Pacific Railroad to connect with transcontinental railroad from the east at the *eastern* boundary of California, and to change its route and amend articles and accept additional grants from Congress.

June 28, 1870...Congress passed joint resolution authorizing Southern Pacific Railroad to construct upon the route as near as may be, shown by map of 1867 (from San Francisco via Mojave to Colorado

river at Needles), and to receive patents to lands upon same terms, etc., as granted by act of July 27, 1866, "expressly saving and reserving the rights of actual settlers, together with the other conditions and restrictions provided for in the 3rd section of said act."

March 3, 1871 ..Act of Congress granting lands to Southern Pacific Company and Texas Pacific Company, and authorizing the Southern Pacific Company to construct its road from Tehachapi Pass, via Los Angeles, to the Colorado river at Fort Yuma.

April 3, 1871 ...Southern Pacific map of general route from Mojave, via Los Angles, to Yuma filed. (record 2350, case 71, and see map 39, vol. 6.)

March 9, 1872 . Atlantic & Pacific map of definite location of section from range 7 east, S. B. M., to west line of Los Angeles County, filed in Interior Department. (For this map see Vol. 6, No. 31.) Filed and approved by Secretary April 11, 1872 (2240, case 71). Approved by Comr. and lands withdrawn in 30-mile limits Apr. 22, 1872 (rec. 2678, case 71. Withdrawal map, rec. Vol 6, No. 41, case 71.)

Aug. 15, 1872 ...Atlantic and Pacific maps of definite location, covering sections (1) from Colorado river to range 7 east, S. B. M., (2) from west line of Los Angeles County to Pacific ocean at Ventura, filed in Interior Department. (For these maps, see Vol. 6, Nos. 29, 30.) Filed August 15, 1872. Approved by Secretary Apr. 16, 1874. (case 71.) Lands withdrawn in 30 mile limits Nov. 23, 1874. (rec. 2678, 2685, case 71. Withdrawal maps rec Vol. 6, Nos. 9, 42, case 71.)

May 11, 1874 ...*First section* Southern Pacific (branch) road as definitely located and constructed from San Fernando via Los Angeles to Spadra, filed in Interior Department. Definite withdrawal within 20 and 30-mile limits, May 11, 1874.

Nov. 15, 1875 ...*Second section* Southern Pacific (branch) road as definitely located and constructed from Spadra to range 1 west, filed in Interior Department. Definite withdrawal within 20 and 30-mile limits December 20, 1875.

July 24, 1876 ... *Third section* Southern Pacific (branch) as definitely located and constructed from range 1 west to range 7 east, filed in Interior Department. Definite withdrawal within 20 and 30-mile limits Aug. 19, 1876.

March 6, 1877 *Fourth section* Southern Pacific (branch) as definitely located and constructed from San Fernando to Mojave, filed in Interior Department. Definite withdrawal within 20 and 30-mile limits Mar. 27, 1877.

Jan. 31, 1878 ...*Fifth section* Southern Pacific (branch) as definitely located and constructed from range 7 east to Colorado river at Yuma, filed in Interior Department

Jan. 7, 1885 Sectional maps showing Southern Pacific Railroad from Mojave to Colorado river at Needles, as constructed and located, under joint resolution of June 28, 1870, filed in Interior Department.

July 6, 1886.... Act of Congress forfeiting Atlantic and Pacific Railroad grant, and restoring lands to public domain.

March 3, 1887 ...Act of Congress providing for adjustment of railroad land grants and protection of *bona fide* purchasers from railroad, of lands excepted from the grant.

June 7, 1887 ..... Decision of the Secretary of Interior promulgated to the effect that grant to Atlantic and Pacific Railroad, in California, was not operated upon by Southern Pacific grant of 1871, and that the lands were restored to public domain. (5 L. D., 691, 6 L. D., 679, 6 L. D., 812, 6 id., 816.)

Nov. 22, 1889 ... Amended bill of complaint filed by United States in United States Circuit Court, Southern District of California, against Southern Pacific Railroad Company (defendants being then in court), putting in issue grant made to Atlantic and Pacific Railroad Company, definite location of road and forfeiture to United States, and restoration to public domain by act of July 6, 1886. (see 168 U. S., page 30.)

Nov. 12, 1892 ... Decision of above case of United States vs. Southern Pacific Railroad Company by United States Supreme Court (146 U. S., 570–615–619), adjudging that Atlantic and Pacific Railroad Company received a valid grant from Congress, had definitely located its entire route, and that its grant in California had been forfeited and restored to the public domain free from any title or claim of the Southern Pacific Railroad Company, which could prevent the forfeiture and restoration.

May 17, 1890 .. This bill was filed by the United States against Southern Pacific Railroad Company, *et al.*

Feb. 12, 1896 Act of Congress amending act of March 3, 1887, and providing for payment to Government by purchasers of difference in price paid to railroad on executory contracts for patented land and Government price.

March 2, 1896 Act of Congress confirming titles of *bona fide* purchasers from railroad of patented lands and referring in section 3 to the act of March 3, 1887.

Appendix (No. 3).

Table of Land Sales.

Showing names of purchasers of land from S. P. R.R Co., date of contract, purchase price, amount paid, and whether patented, with references to the record.

Explanation I. All contracts for unpatented lands contain a provision to the effect that the railroad company has not yet secured title or patent for the land, and that if it fails to do so the contract shall be void, and that it will refund the purchase-money paid, without interest.

Explanation II. This table follows in its order the decree of the Circuit Court.

First. (a) George Loomis, trustee for Pacific Coast Oil Company, executory contract dated April, 25, 1889; 560 acres; purchase price $2800; amount paid $560 prior to commencement of this suit. Land unpatented. [rec. 223.]

(b) George Loomis, trustee for Pacific Coast Oil Company, sixteen separate executory contracts, in identical form, each dated May 8, 1890; 2279 86-100 acres; price $5.00 per acre, paid $1.00 per acre; land unpatented and partly unsurveyed. [rec. 234 to 307 and 351 to 361.]

Second. Pacific Coast Oil Company, quit claim deed, dated March 5, 1888; 313 82-100 acres; purchase price $784.55; paid; land unpatented. [rec. 228.]

Third. Jackson A. Graves, assignee of Atlantic and Pacific Fibre Importing and Manufacturing Company, limited, a corporation of Great Britain, which company purchased from railroad by contracts dated July 23, 1885 [rec. 321–327–333], about 35,000 acres; average purchase price about $1.00 per acre; land unpatented.

Graves procured a conveyance from the British corporation *pendente lite*, January 27, 1893 [rec. 314, 340], and paid nothing but entered into a contract by which he agreed to devote his legal services to protect the company in their original purchase money paid for the land and to make what he could out of it over and above that. Graves had actual knowledge of the pendency of this suit [rec. 314, 315]; lands unpatented.

There was no testimony by the officers or agents of that company that the "Fibre Co." purchased in good faith.

Fourth. Mary L. Gould, executory contract dated July 25, 1885; 160 acres; purchase price $400, amount paid $80; land unpatented. [record 379.]

Fifth. M. W. Stimson, two executory contracts, both dated December 22, 1887; 320 acres; purchase price $800, amount paid $160; land unpatented. [Not reprinted, see record in case 6, see record case 71 O. T., 1897, pp. 2909, 2915.

Sixth. Charles M. Stimson, executory contract dated December 22, 1887; 160 acres; purchase price $400, amount paid $80; land unpatented. [Not reprinted; see record in case 71, p. 2896.]

Seventh. Daniel D. Brunk, executory contract dated July 24, 1885; 80 acres; purchase price $200, amount paid $40; land unpatented. [record 427.]

Eighth. Stefano Cuneo, executory contract dated March 30, 1885; 676.36 acres; purchase price $676.36, amount paid $135.27; land unpatented. [record 437.]

Ninth. G. Suraco, executory contract dated March 30, 1885; 640 acres; purchase price $1600, amount paid $320; land unpatented. [record 445.]

Tenth. William H. Carlson, two executory contracts dated November 22, 1884, and November 1, 1886; about 800 acres; purchase price $1767, amount paid $353; land unpatented. [record 456, 463.]

Eleventh. Thomas F. Mitchell, executory contract dated March 18, 1885; 320 acres; purchase price $550, amount paid $225.00; land unpatented. [record 479.]

Twelfth. Ramon Perea, executory contract dated July 1, 1886; 640 acres; purchase price $1600.00,

amount paid $320.00; land unpatented. [record 486.]

Thirteenth. Jackson A. Graves, grantee of Atlantic and Pacific Fibre Importing and Manufacturing Company, Limited, a corporation of Great Britain; deed dated July 23, 1885, to the British corporation for about 5000 acres [record, 315]; purchase price $56018.00, fully paid. Graves procured a conveyance from the British corporation *pendente lite*, January 27, 1893 [record, 340], and paid nothing, but entered into a contract by which he agreed to devote his legal services to protect the company in their original purchase-money paid for the land and to make what he could out of it over and above that. Graves had actual knowledge of the pendency of this suit [record 314]; land is patented.

There is no testimony by the officers or agents of that company that the "Fibre Company" purchased in good faith.

Fourteenth. (a) D. M. Sutherland, deed dated July 19, 1893, pursuant to contract dated July 28, 1887 [record, 7, 497]; 80 acres; purchase price $200, paid; land is patented.

(b) D. M. Sutherland, executory contract dated July 28, 1887, for 160 acres; purchase price $400, amount paid $133.00; land is patented. [record, 503.]

Fifteenth. Clarence T. Cleve, deed dated August 12, 1890, pursuant to contract from railroad dated August 27, 1886 [record, 7 and 513]; 160 acres; purchase price $400, paid; land is patented.

Sixteenth. Peter Hamilton and Mrs. Thomas Allison, deed dated January 18, 1889, pursuant to contract dated January 14, 1884 [record 8, 528]; 640 acres; purchase price $1600, paid; land is patented.

Seventeenth. William Ferguson and James Hamilton; deed dated January 18, 1889, pursuant to contract dated January 14, 1884 [rec. 8, 542]; 640 acres; price $1600, paid; land is patented.

Eighteenth. Ira H. Bradshaw; deed dated September 29, 1887, pursuant to contract dated August 26, 1886 [rec 8, 553]; 160 acres; purchase price $400, paid; land is patented.

Nineteenth. Peter Cook, M. L. Wicks and Alexan-

der Cook; deed dated June 21, 1887; 640 acres; purchase price $1600, fully paid; land is patented. [rec. 628.]

Twentieth. Mary L. Gould, deed dated January 28, 1890, pursuant to contract dated January 2, 1885 [rec. 5, 386]; 200 acres; purchase price $521, paid; land is patented.

Twenty-first. (a) Will D. Gould, deed dated Aug. 8, 1887, pursuant to contract dated July 28, 1887 [rec. 5, 407]; 160 acres; purchase price, $400, paid; land is patented. (b) Will D. Gould executory contract dated August 8, 1887; 160 acres; purchase price $400, amount paid $80; land is patented. [rec. 403.]

Twenty-second. James M. Hait, deed dated May 7, 1888, pursuant to contract dated Jan. 2, 1885 [rec. 5, 412]; 80 acres; purchase price $400, paid; land is patented.

Twenty third. Richard Dillon and John Kenealy, two deeds dated October 2, 1886; 223 acres; purchase price $793, paid; land is patented. [rec 562, 567.]

Twenty-fourth. J. Garbet and McH. Pierce; deed January 28, 1890; pursuant to contract dated January 30, 1888 [rec 9, and 578]; 80 acres; purchase price $200, paid; land is patented.

Twenty-fifth. Nathan Cole, Jr., deed dated January 7, 1892, pursuant to contract dated June 24, 1885 [rec. 9, 10,589]; 320 acres; purchase price, $800, paid; land is patented.

Twenty-sixth. Jacob Harps, deed dated October 7, 1887, pursuant to contract dated August 14, 1884 [rec. 10, 600]; 144 acres; purchase price $1449, paid; land is patented.

Twenty-eighth. Pablo Lopez, deed dated July 18, 1887; about 162 acres; purchase price $406, paid; land is patented. [rec. 608.]

Twenty ninth. Jesse M. Blanchard, deed dated March 12, 1887; about 159 acres; purchase price $399.95, paid; land is patented. [rec. 617.]

Thirtieth. Richard Dillon, deed dated October 2, 1886; 93 acres; purchase price $469.40, paid; land is patented. [rec. 567.]

The lands above described so far as patented were included in four patents issued by the United States to the Southern Pacific Railroad Company, dated respectively March 29, 1876; April 4, 1879; December 27, 1883; January 9, 1885. [rec. 644 to 667.]

Where deeds have been made pursuant to a contract, payment of 1-5 was made at date of contract and the balance at date of deed. [rec. 5, 7, 9.]